Gujarat High Court
Shankarlal Sohanlal Sharma vs State Of Gujarat on 21 April, 2023
Bench: A.S. Supehia

C/SCA/6713/2023 JUDGMENT DATED: 21/04/2023

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CIVIL APPLICATION NO. 6713 of 2023

FOR APPROVAL AND SIGNATURE:
HONOURABLE MR. JUSTICE A.S. SUPEHIA Sd/-
and
HONOURABLE MR. JUSTICE DIVYESH A. JOSHI Sd/-

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1 Whether Reporters of Local Papers may be allowed to see the judgment ? NO

2 To be referred to the Reporter or not ? NO

3 Whether their Lordships wish to see the fair copy of the judgment ? NO

4 Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ? NO

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SHANKARLAL SOHANLAL SHARMA
Versus
STATE OF GUJARAT & 3 other(s)

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Appearance:
MR ARJUNSINGH B CHAUHAN(11510) for the Petitioner(s) No. 1
for the Respondent(s) No. 3
MR ASHUTOSH DAVE, AGP for the Respondent(s) No. 1
DS AFF.NOT FILED (R) for the Respondent(s) No. 1,2,4

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CORAM:HONOURABLE MR. JUSTICE A.S. SUPEHIA
and
HONOURABLE MR. JUSTICE DIVYESH A. JOSHI

Date : 21/04/2023
ORAL JUDGMENT

(PER : HONOURABLE MR. JUSTICE A.S. SUPEHIA)

1. At the outset, learned advocate Mr.Chauhan has submitted that the issue is squarely covered by the judgment dated 12.04.2023 passed in Special Civil Application No.6176 of 2023 in the case of

co-detenue.

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2. By way of the present petition under Article 226 of the Constitution of India, the petitioner has challenged the Order of Detention No.DTN/ECA/5/2023 dated 31.03.2023 passed by the respondent No.2- District Magistrate, Surat, in exercise of powers under Section 3 (2) of the Prevention of Black Marketing and Maintenance of Supplies of Essential Commodities Act, 1980, by which he has been detained with a view to prevent him from acting in prejudicial manner to the maintenance of supplies of the commodities essential to the community.

3. Learned Advocate, Mr.Chauhan for the petitioner has mainly argued that though the order of detention is bad in law, illegal, unconstitutional, null and void, he would submit on the ground of non- application of mind on the part of the Detaining Authority in recording his subjective satisfaction for passing the detention order. He submitted that in absence of any material which would satisfy the Authority who has passed the impugned order, it is totally non-application of mind on the part of the Authority. He also submitted that on 31.03.2023, the present detenue was detained. He also submitted that the detaining authority has acted in high handed manner and it is in blatant disregard of the order passed by Division Bench of this Court and, therefore, such order is required to be quashed and set aside, in view of the fact that the order of detention is not in consonance with the provisions of Sub-section (4) of section 3 of the Act.

3.1 Mr.Chauhan has also submitted that it is statutory obligation of the detaining authority to inform the Central Government within 7 days about the passing of the detention order together with grounds, other particulars and materials relied upon and that too in English language. The detaining C/SCA/6713/2023 JUDGMENT DATED: 21/04/2023 authority has not supplied such documents. It is further submitted that some of the documents supplied along with the detention order are not legible and supply of such illegible documents would amount to non- communication of the grounds of detention and, therefore, the order of detention has become violative of Article 22, Clause (5) of the Constitution of India.

3.2 Mr.Chauhan further submitted that, in the list of documents, statements of certain witnesses have been referred, however, in the compilation such statements have not been supplied to the petitioner, thus, the detaining authority has failed in supplying relevant documents relied upon by it while passing the order of detention and the said action of the detaining authority would amount to noncommunication of grounds of detention.

3.3 Mr.Chauhan as further submitted that the detenu has already filed representation against the order of detention but no action has been taken by the detaining authority on such representation. He submitted that rights conferred upon the detenu by Article 22, Clause (5) of the Constitution of India have been violated, firstly by not informing the grounds on which the order of detention has been passed, and secondly, by not deciding the representation made by the detenu against the order of detention. It is well settled that right to make a representation implies that the detenu should have all the information that will enable him to make an effective representation. Such a right of the

detenu is subject to right or privileges given by Clause (3) of Article 22, but at the same time refusal to supply relevant documents or supply of illegible or blur copies of the documents relied upon by the detaining authority is in violation of Article C/SCA/6713/2023 JUDGMENT DATED: 21/04/2023 22, Clause (5). He further submitted that it is also an admitted position that the detaining authority has placed reliance upon solitary offence against the detenu, wherein the detenu has already been released on bail by the competent Court. Said order is not challenged by the competent authority before appropriate forum.

3.4 In support of his submissions, learned advocate, Mr.Chauhan has relied upon the latest decision of the Supreme Court in the case of State of Manipur v. Buyamayum Abdul Hanan @ Anand, reported in JT 2022 (10) SC 264 and another decision in the case of Abdul Sathar Ibrahim Manik v. Union of India, reported in 1992 (1) SCC 1.

4. On the other hand, learned AGP, Mr.Dave, has opposed this petition and submitted that considering the grounds of detention, it appears that the petitioner had indulged in such activities which is prejudicial to the maintenance of supplies of essential commodities. He, therefore, urged that the petition deserves to be dismissed. He also submitted that said complaint was registered before Sachin GIDC Police Station and concerned AGP had inadvertently inquired from the officer of the police station, whereas present proceedings are initiated by the office of the District Magistrate under the provisions of the Prevention of Black Marketing and Maintenance & Supplies of Essential Commodities Act, 1955.

5. Heard the learned Advocates appearing for the respective parties. We have also gone through the grounds raised by the petitioner challenging his detention order and also perused the detention order along with grounds for detaining the petitioner. It is also found that some of the C/SCA/6713/2023 JUDGMENT DATED: 21/04/2023 documents supplied to the detenu along with the detention order are not legible and supply of such illegible documents would amount to non-communication of the grounds of detention and, therefore, the order of detention has become violative of Article 22, Clause (5) of the Constitution of India. Moreover, the detenu had filed a representation against the order of detention but no action is taken by the detaining authority on such representation. It is well settled that right to make a representation implies that the detenu should have all the information that will enable him to make an effective representation and supply of illegible or blur copies of the documents relied upon by the detaining authority is in violation of Article 22, Clause (5). Not only that in connection with solitary offence relied upon by the detaining authority, the detenu has already been released on bail by the competent Court and such order is not challenged by the competent authority before appropriate forum.

6. In the case of Sushanta Kumar Banik v. State of Tripura, AIR 2022 S.C. 4715 before Honourable Apex Court, the fact of the accused/detenu being released on bail for the offences under the NDPS Act, 1985 was suppressed and hence, the Apex Court has held that such vital fact could not have been withheld by the sponsoring authority before the detaining authority. In the present case, though the detaining authority was aware of the fact that the detenu is released on bail in all these offences, the order does not anyway contain that the detaining authority has applied its mind to the afore-noted facts. The Honourable Apex Court has observed as under in aforesaid judgment:

"22. As noted above, in the case on hand, in both the cases relied upon by the detaining authority for the purpose of C/SCA/6713/2023 JUDGMENT DATED: 21/04/2023 preventively detaining the appellant herein, the appellant was already ordered to be released on bail by the concerned Special Court. Indisputably, we do not find any reference of this fact in the proposal forwarded by the Superintendent of Police, West Tripura District while requesting to process the order of detention. The reason for laying much stress on this aspect of the matter is the fact that the appellant though arrested in connection with the offence under the NDPS Act, 1985, the Special Court, Tripura thought fit to release the appellant on bail despite the rigours of Section 37 of the NDPS Act, 1985. Section 37 of the NDPS Act, 1985 reads thus:

> "Section 37. Offences to be cognizable and nonbailable.
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> --(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974)--
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> (a) every offence punishable under this Act shall be cognizable;
>
> (b) no person accused of an offence punishable for offences under section 19 or section 24 or section 27A and also for offences involving commercial quantity shall be released on bail or on his own bond unless--
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> (i) the Public Prosecutor has been given an opportunity to oppose the application for such release, and
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> (ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail. (2) The limitations on granting of bail specified in clause
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> (b) of subsection (1) are in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force, on granting of bail."

23. A plain reading of the aforesaid provision would indicate that the accused arrested under the NDPS Act, 1985 can be ordered to be released on bail only if the Court is satisfied that there are reasonable grounds for believing that the accused is not guilty of such offence and that he is not likely to commit any offence while on bail. If the appellant herein was ordered to be released on bail despite the rigours of Section 37 of the NDPS Act, 1985, then the same is suggestive that the Court concerned might not have found any prima facie case against him. Had this fact been brought to the notice of the detaining authority, then it would have influenced the mind of the detaining authority one way or the other on the question whether or not to make an order of detention. The State never thought to even challenge the bail orders passed by the special court releasing the appellant on C/SCA/6713/2023 JUDGMENT DATED: 21/04/2023 bail.

24. In Asha Devi v. Additional Chief Secretary to the Government of Gujarat and Anr., 1979 Crl LJ 203, this Court pointed out that:

> "... if material or vital facts which would influence the minds of the detaining authority one way or the other on the question whether or not to make the detention order, are not placed before or are not considered by the detaining authority it would vitiate its subjective satisfaction rendering the detention order illegal."

25. .....

26. From the above decisions, it emerges that the requisite subjective satisfaction, the formation of which is a condition precedent to passing of a detention order will get vitiated if material or vital facts which would have bearing on the issue and weighed the satisfaction of the detaining authority one way or the other and influence his mind are either withheld or suppressed by the sponsoring authority or ignored and not considered by the detaining authority before issuing the detention order.

27. It is clear to our mind that in the case on hand at the time when the detaining authority passed the detention order, this vital fact, namely, that the appellant detenu had been released on bail by the Special Court, Tripura despite the rigours of Section 37 of the NDPS Act, 1985, had not been brought to the notice and on the other hand, this fact was withheld and the detaining authority was given to understand that the trial of those criminal cases was pending."

6.1 In the case of Vijay Narain v. State of Bihar, 1984 (3) S.C.C. 14, the Apex Court asserted that when a person is enlarged on bail by a competent Court, great caution should be exercised in scrutinizing the validity of an order of preventive detention order which is based on the same charge, which is to be tried by the criminal Court. It is also noticed by this Court that the order does not refer to any application for cancellation of bail having been filed by the State authorities.

6.2 In a recent decision, in the case of Pramod Singla v. Union of India

& Others, in a Criminal Appeal arising out of Special Leave Petition (Criminal) No.10798 of 2022, decided on 10th April 2023, Honourble Supreme Court has observed as under:-

"26. Further, in the Jayanarayan Sukul Case (Supra), the same issue was considered by another Constitution Bench of this Court, wherein it went on to reiterate the principles in the Pankaj Kumar Case (Supra), and held that the central Government must act independently of the Advisory Board, and can decide the representation made by the detenue without hearing from the Advisory Board. For the purpose of convenience, the relevant paragraph of the said judgment is being reproduced herein: "In the present case, the State of West Bengal is guilty of infraction of the Constitutional provisions not only by inordinate delay of the consideration of the representation but also by putting of the consideration till after the receipt of the opinion of the Advisory Board. As we have already observed there is no explanation for this inordinate delay. The Superintendent who made the enquiry did not affirm an affidavit. The State has given no information as to why this long delay occurred. The inescapable conclusion in the present case is that the appropriate authority failed to discharge its Constitutional obligation by inactivity and lack of independent judgment."

27. In the Harardhan Saha Case (Supra), yet another Constitution Bench of this Court considered the distinction between the consideration of the representation made by the detenue in cases of preventive detention, and it was stated that if the representation was made before the matter is referred to the Advisory Board, the detaining authority must consider such representation, but if the representation is made after the matter is referred to the Advisory Board, the detaining authority would first consider it and then send it to the Advisory Board. The relevant paragraph from the said judgment is being reproduced hereunder:

"The representation of a detenu is to be considered.

There is an obligation on the State to consider the representation. The Advisory Board has adequate power to examine the entire material. The Board can also call for more materials. The Board may call the detenu at his request. The Constitution of the Board shows that it is to consist of Judges or persons qualified to be Judges of the High Court. The Constitution of the Board observes the fundamental of fair play and C/SCA/6713/2023 JUDGMENT DATED: 21/04/2023 principles of natural justice. It is not the requirement of principles of natural justice that there must be an oral hearing. Section 8 of the Act which casts an obligation on the State to consider the representation affords the detenu all the rights which are guaranteed by Article 22(5). The Government considers the representation to ascertain essentially whether the order is in conformity with the power under the law. The Board, on the other hand, considers whether in the light of the representation there is sufficient cause for detention.

Principles of natural justice are an element in considering the reasonableness of a restriction where Article 19 is applicable. At the stage of consideration of representation by the State Government, the obligation of the State Government is

such as Article 22(5) implies. Section 8 of the Act is in complete conformity with Article 22(5) because this section follows the provisions of the Constitution. If the representation of the detenu is received before the matter is referred to the Advisory Board, the detaining authority considers the representation. If a representation is made after the matter has been referred to the Advisory Board, the detaining authority will consider it before it will send representation to the Advisory Board."

7. It is true that if a person is tried separately for the criminal offences, it would not debar the authorities from passing a detention order under the preventive detention law. However, when a case comes before the Court, the Court must ask in deciding its legality is: Was the ordinary law of the land sufficient to deal with the situation? If the answer is in the affirmative, the detention order will be illegal. In the case of Rekha vs. State of Tamil Nadu, as reported at 2011 (4) RCR (Cri) 21, the Hon'ble Apex Court, while dealing with the provisions of preventive detention with regard to dangerous activities of bootleggers, drug offenders etc., held that personal liberty of citizen can be protected when ordinary law is sufficient to deal with the case. The Apex Court in paragrahs 31, 32 and 37 of the said judgment held as under:-

C/SCA/6713/2023 JUDGMENT DATED: 21/04/2023 "31 Preventive detention is, by nature, repugnant to democratic ideas and an anathema to the rule of law. No such law exists in the USA and in England (except during war time). Since, however, Article 22(3)(b) of the Constitution of India permits preventive detention, we cannot hold it illegal but we must confine the power of preventive detention within very narrow limits, otherwise we will be taking away the great right to liberty guaranteed by Article 21 of the Constitution of India which was won after long, arduous, historic struggles. It follows, therefore, that if the ordinary law of the land (Indian Penal Code and other penal statutes) can deal with a situation, recourse to a preventive detention law will be illegal.

32 Whenever an order under a preventive detention law is challenged, one of the questions the court must ask in deciding its legality is: Was the ordinary law of the land sufficient to deal with the situation? If the answer is in the affirmative, the detention order will be illegal. In the present case, the charge against the detenue was of selling expired drugs after changing their labels. Surely the relevant provisions in the Indian Penal Code and the Drugs and Cosmetics Act were sufficient to deal with his situation. Hence, in our opinion, for this reason also, the detention order in question was illegal.

37. No doubt it has been held in the Constitution Bench decision in Haradhan Saha's case (supra) that even if a person is liable to be tried in a criminal court for commission of a criminal offence, or is actually being so tried, that does not debar the authorities from passing a detention order under a preventive detention law. This observation, to be understood correctly, must, however, be construed in the background of the constitutional scheme in Articles 21 and 22 of the Constitution (which we have already explained). Articles 22(3)(b) is only an exception to Article 21 and it is not itself a fundamental right. It is Article 21 which is central to the whole chapter on fundamental rights in our Constitution. The right to liberty means that before sending a person to prison a trial must ordinarily be held giving him opportunity of placing his defence through his lawyer. It follows that if a person is liable to be tried, or is actually being tried, for a criminal offence, but the criminal law

(Indian Penal Code or other penal statutes) will not be able to deal with the situation, then, and only then, can the preventive detention law be taken recourse to.8 In the present case, as stated C/SCA/6713/2023 JUDGMENT DATED: 21/04/2023 here-in-above, the licence of the petitioner to run the fair price shop was initially suspended and subsequently cancelled. It was not possible for petitioner detenu to run fair price shop and indulge in such prejudicial activities, which would lead the authority to pass the detention order under preventive detention law. Though, it is not a question of sitting over an appeal or appreciating the material collected by the Authority while deciding the writ petition, but, if the detention order is passed without having any material, which would lead to subjective satisfaction of the authority that the detenue shall continue his illegal activities, the court can certainly arrive at the conclusion that the subjective satisfaction arrived at by the Authority is vitiated. In the present case, there is no material on record which would establish that the Authority was right in arriving at the conclusion that the detenu shall continue his prejudicial activities. Hence in the above facts and circumstances, the petition requires acceptance and is deserves to be allowed."

8. In the case of State of Manipur v. Buyamayum Abdul Hanan @ Anand (supra), Supreme Court has observed as under:-

> "14. Learned counsel for the appellants has not disputed the proposition settled by this Court that supply of legible copies of the documents relied upon by the detaining authority is a sine qua non for making an effective representation which is the fundamental right of detenu guaranteed under Article 22(5) of the Constitution. The only submission made by learned counsel for the appellants is that respondent no.1, at no stage, raised any objection that the pages of the documents relied upon by the detaining authority in the grounds of detention were illegible or blurred which, in any manner, has denied him the opportunity of making representation and the objection was raised, for the first time, before the High Court and not at any stage before the detaining authority. In the given facts and circumstances, learned counsel submits that the interference made by the High Court in setting aside the order of detention is not legally sustainable and deserves to be interfered with by this Court. .....
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> 16. Article 22(5) of the Constitution confers two rights on the detenu, firstly, the right to be informed of the grounds on which the order of detention has been made and, secondly, to be afforded an earliest opportunity to make a representation against the order of detention. 17. It is well settled that right to make a representation implies that the detenu should have all C/SCA/6713/2023 JUDGMENT DATED: 21/04/2023 the information that will enable him to make an effective representation. No doubt, this right is again subject to the right or privilege given by clause (6). At the same time, refusal to supply the documents requested by the detenu or supply of illegible or blurred copies of the documents relied upon by the detaining authority amounts to violation of Article 22(5) of the Constitution. Although it is true that whether an opportunity has been afforded to make an effective representation always depends on the facts and circumstances of each case. .....

21. Thus, the legal position has been settled by this Court that the right to make representation is a fundamental right of the detenu under Article 22(5) of the Constitution and supply of the illegible copy of documents which has been relied upon by the detaining authority indeed has deprived him in making an effective representation and denial thereof will hold the order of detention illegal and not in accordance with the procedure contemplated under law.

.....

24. In other words, the right of personal liberty and individual freedom which is probably the most cherished is not, in any manner, arbitrarily to be taken away from him even temporarily without following the procedure prescribed by law and once the detenu was able to satisfy while assailing the order of detention before the High Court in exercise of jurisdiction Article 226 of the Constitution holding that the grounds of detention did not satisfy the rigors of proof as a foundational effect which has enabled him in making effective representation in assailing the order of detention in view of the protection provided under Article 22(5) of the Constitution, the same renders the order of detention illegal and we find no error being committed by the High Court in setting aside the order of preventive detention under the impugned judgment."

9. In the case of Abdul Sathar Ibrahim Manik v. Union of India (supra), it is observed as under:-

"12. ..... Having regard to the various above-cited decisions on the points often raised we find it appropriate to set down our conclusions as under:

(1) A detention order can validly be passed even in the case of a person who is already in custody. In such a case, it must appear from the grounds that the authority was aware that the detenu was already in custody.

C/SCA/6713/2023 JUDGMENT DATED: 21/04/2023 (2) When such awareness is there then it should further appear from the grounds that there was enough material necessitating the detention of the person in custody. This aspect depends upon various considerations and facts and circumstances of each case. If there is a possibility of his being released and on being so released he is likely to indulge in prejudicial activity then that would be one such compelling necessity to pass the detention order. The order cannot be quashed on the ground that the proper course for the authority was to oppose the bail and that if bail is granted notwithstanding such opposition the same can be questioned before a higher Court.

(3) If the detenu has moved for bail then the application and the order thereon refusing bail even if not placed before the detaining authority it does not amount to suppression of relevant material. The question of non-application of mind and satisfaction being impaired does not arise as long as the detaining authority was

aware of the fact that the detenu was in actual custody.

(4) Accordingly the non-supply of the copies of bail application or the order refusing bail to the detenu cannot affect the detenu's right of being afforded a reasonable opportunity guaranteed under Article 22(5) when it is clear that the authority has not relied or referred to the same.

(5) When the detaining authority has merely referred to them in the narration of events and has not relied upon them, failure to supply bail application and order refusing bail will not cause any prejudice to the detenu in making an effective representation. Only when the detaining authority has not only referred to but also relied upon them in arriv- ing at the necessary satisfaction then failure to supply these documents, may, in certain cases depending upon the facts and circumstances amount to violation of Article 22(5) of the Constitution of India. Whether in a given case the detaining authority has casually or passingly referred to these documents or also relied upon them depends upon the facts and the grounds, which aspect can be examined by the Court.

(6) In a case where detenu is released on bail and is at liberty at the time of passing the order of detention, then the detaining authority has to necessarily rely upon them as that would be a vital ground for ordering detention. In such a case C/SCA/6713/2023 JUDGMENT DATED: 21/04/2023 the bail application and the order granting bail should necessarily be placed before the authority and the copies should also be supplied to the detenu."

10. In view of above decisions and considering facts of present case, it is also found that some of the documents supplied along with the detention order to the detenu are not legible and statements of certain witnesses have also not been supplied to the petitioner, thus, the detaining authority has failed in supplying relevant documents relied upon by it for passing the detention order. Moreover, in connection with the solitary offence upon which reliance is placed by the detaining authority, the detenu has already been released on bail by the competent Court. Considering all these aspects and the law laid down by Honourable the Apex Court in the decisions referred herein above, we find that the impugned order is required to be quashed and set aside.

11. In the result, the petition is allowed. The impugned order of detention DTN/ECA/5/2023 dated 31.03.2023 passed by the respondent No.2-District Magistrate, Surat is quashed and set aside. The detenu is ordered to be set at liberty forthwith if he is not required to be detained in connection with any other case. Rule is made absolute accordingly. Direct Service is permitted.

Sd/-

(A. S. SUPEHIA, J) Sd/-

(DIVYESH A. JOSHI,J) ABHISHEK/75